

IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. DA 22-0062

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JOHN BREUER,

Plaintiff/Appellee,

-VS-

STATE OF MONTANA,

Defendant/Appellant.  
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APPELLEE'S ANSWER BRIEF

On Appeal from the Montana Third Judicial District Court,  
Powell County, Cause No. DV-16-23  
Hon. Ray Dayton

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## **STATEMENT OF ISSUES**

1. Whether the District Court acted within its discretion when it excluded evidence related to Jack Breuer's prior railroad back injury and administrative disability determination while also allowing other cause evidence related to Jack's back pain, limitations and other health issues at trial.

2. Even if the District Court abused its discretion, were the State's substantial rights affected where the State repeatedly referenced other cause evidence at trial.

## **STATEMENT OF THE CASE**

This is an admitted liability case for a serious right shoulder injury Jack Breuer sustained in a January 2013 car crash. The collision was caused by an employee of the State of Montana who lost control of his pickup truck at high speeds on icy roads and collided with Jack and Diane Breuer near Lincoln, Montana. Dkt. 84, Pre-Trial Order; Dkt. 1, Complaint.

Jack did not injure his back in the crash and did not claim any damages for a back injury. Before trial, the State partially conceded causation but contested the extent of Jack's shoulder injury and the amount of damages. Dkt. 1, Complaint; Dkt. 3, Answer; Dkt. 84, Pre-Trial Order, pp. 1-11. Jack sought general and special damages, but did not seek damages related to any loss of employment such

as lost wages or loss of earning capacity. Dkt. 1, Complaint, p. 3. Jack was retired at the time of the crash. He was sixty-seven years old at the time of trial.

Jack moved *in limine* to exclude collateral source evidence, including Railroad Disability (RRD) and Social Security Disability (SSD) records, as well as other cause evidence which was not connected to Jack's shoulder injuries or damages. Dkt. 17, Plaintiff's Motion *in Limine*. The State opposed the Motion, arguing that evidence related to a 2005 railroad low back injury and disability determination was admissible at trial. Specifically, the State argued that it was entitled to inform the jury that Jack claimed to be totally disabled and was found to be disabled for purposes of his former track laborer job, that Jack accepted the disability finding and has accepted monetary payments for his disability, as well as evidence of the limitations he claimed as a basis of the occupational disability determination. Dkt. 20, Defendant's Response to Plaintiff's Motion *in Limine*. The State argued: "I want to be able to say that [Jack] applied for Social Sec. . . , or that he applied for disability benefits." Motions Hearing Tr., December 5, 2018, p. 9:21-22.

The District Court granted Jack's motion *in limine*, precluding any references to collateral sources such as railroad retirement and social security disability payments as well as medicare payments. The court further excluded

evidence of the 2005 railroad low back injury and the related administrative disability determinations. Dkt. 34, Order Granting Plaintiff's Motion *in Limine*. On the first day of trial, the parties clarified with the Court that the State could introduce evidence related to back pain and limitations for the time period after the 2013 collision. Trial Tr., pp. 12:24-25, 13:1-5.

The State did not retain an expert to address medical causation or Jack's functional limitations. Nor did the State conduct discovery depositions of any of Jack's past or present treating physicians or request an independent medical examination. At trial, the State's only witness was Alex Kumar, the driver that caused the collision. Trial Tr., p. 4. The State did not make an offer of proof at trial.

At the close of trial, Jack requested a verdict in the amount of \$758,343.05. Trial Tr., p. 499:17. The jury returned a unanimous verdict in the amount of \$510,345.05. Trial Tr., p. 531:15. The State did not file any post-trial motions, including a motion for new trial.

## **STATEMENT OF FACTS**

### **A. Car Wreck And Shoulder Injury.**

On January 11, 2013, Jack and Diane Breuer were traveling on Highway 200 from Dixon to Great Falls. The weather was cold and clear. The roads were



intermittently icy. Trial Tr., pp. 198:13-25, 199:1-18. As they were driving about 10 miles west of Lincoln, a State employee, Alexander Kumar, was coming the opposite direction in a State-owned pickup truck. Kumar was driving too fast for the conditions and lost control going around a curve. The pickup came across the center line and into Breuers' lane of travel and slammed into the the Breuers' vehicle. The airbags deployed and slammed into Jack and Diane. The collision sent them across the highway where they slammed into the snowbank on the other side of the road. Trial Tr., pp. 199:24-25, 200:1-2; 202:8-11. This was an extremely high-impact crash. Trial Ex. 1-1; 1-2 (Breuer vehicle); 1-3 (State vehicle). Diane suffered three broken ribs and a knee injury. The airbag struck Jack and wrenched his right arm back. The force was so great that the back of his right hand slammed into his head hard enough to cause injuries to his hand and his head. Trial Tr., p. 201:3-18. Jack's right shoulder was in an "extreme" amount of pain after the crash. Trial Tr., p. 208:1-3. Jack and Diane were terrified the car was on fire because of the smoke from the airbags deploying. Trial Tr., p. 318:14-16.

The Breuers were transported to St. Peter's Hospital in Helena by ambulance. Trial Tr., p. 206:4-5. Jack thereafter saw Dr. Lindley, his primary care physician. Dkt. 52, Jeffrey K. Lindley, MD, Dep. Tr., p. 9:20-22. Jack had

previously been seen by Dr. Lindley as a patient and had never complained of right shoulder pain before the crash. Dr. Lindley Dep. Tr., p. 13:8-13. Jack tried chiropractic treatment and massage to address his right shoulder pain. Dr. Lindley Dep. Tr., pp.17:24-25, 18:1-4. In September of 2013, after nearly eight months of right shoulder pain which was not improving, Dr. Lindley ordered an MRI of Jack's shoulder. Dr. Lindley Dep. Tr., p. 18:5-24. The MRI showed tears to Jack's rotator cuff. Trial Tr., p. 230:3-6. At that point, Dr. Lindley referred Jack to Dr. Sherill, an orthopedic surgeon. Dr. Lindley Dep. Tr., p. 20:6-13.

Dr. Sherill attempted injections to address Jack's shoulder pain. The injections only provided temporary pain relief. Trial Tr., pp. 227:10-12, 232:7-8, 232:15-17. At this point, Dr. Sherill concluded that Jack should have shoulder surgery to address his right shoulder injury. Trial Tr., p. 232:1-25. Jack then consulted with Dr. Stayner for a second opinion. Trial Tr., p. 237:4-5.

Dr. Stayner ordered an MRI of Jack's right shoulder. Trial Tr., p. 239:17-19. The MRI confirmed tears and significant damage to Jack's rotator cuff and right shoulder. Dr. Stayner testified that the tears would cause significant pain. Trial Tr., p. 241:4-22. Dr. Stayner opined that Jack's shoulder injury was caused by the crash. Trial Tr., pp. 237:19-24, 238:1-3, 244:3-5.

Dr. Stayner performed shoulder surgery on Jack on September 22, 2016.

Trial Tr., p. 244:11-13. After surgery, Jack had about eight months of physical therapy. After completing his post-surgery care, Jack still had pain and significant problems with range of motion. Trial Tr., pp. 250:17-21, 252:1-9, 253:19-25. Dr. Stayner ordered a second MRI which showed that the repair was intact. However, a small tear which Dr. Stayner had smoothed out because it did not initially meet the criteria for surgery was still present and had not healed. Trial Tr., pp. 254:9-25, 255:1-24.

Jack again tried conservative treatment, including therapy and injections. However, Jack continued to have significant pain, particularly with overhead movement, and limitations with his shoulder. Trial Tr., pp. 257:13-22, 258:6-24. This pain continued unabated for two years after the surgery and more than five years after the wreck. Trial Tr., p. 26:13-21.

Dr. Stayner performed a second shoulder surgery on Jack on December 5, 2019. Jack again had physical therapy after surgery. Exhibit 7–85; Trial Tr., p. 265:7-8. Around nine months after the second surgery, Jack had some improvement, but was still having pain and stiffness. In addition, he continued to have problems with overhead movement. Trial Tr., pp. 268:11-22; 269:1-3. Jack was also having pain complaints with his left shoulder at this point. Dr. Stayner attributed the left shoulder pain to overuse from using the left shoulder more to

compensate for the right shoulder not working well. Dr. Stayner ordered an MRI of Jack's left shoulder which showed inflammation from overuse. Trial Tr., pp. 269:12-24, 270:1-4.

Dr. Stayner testified that, as of November 2021, while Jack had some small improvements, his right shoulder was dysfunctional. He still gets soreness and has trouble with even moderate activities. Trial Tr., p. 270:12-22. Even light duty tasks which involve overhead lifting cause problems for Jack. Jack's rotator cuff remains very weak. Trial Tr., p. 271:3-10. Dr. Stayner opined on a more likely than not basis that Jack's right shoulder dysfunction is permanent. Trial Tr., p. 272:13-14. Dr. Stayner further testified that Jack will require a shoulder replacement surgery in the future. Trial Tr., p. 287:7-11. Thus, according to Dr. Stayner's uncontroverted trial testimony, Jack has endured nine years and counting of pain, weakness and shoulder dysfunction. Moreover, that pain, weakness and dysfunction will continue for the remainder of Jack's life, and he will need another major shoulder surgery. None of this significant pain and limitations, as testified to by Dr. Stayner, relates to Jack's back.

**B. 2005 Back Injury/Administrative Disability Determination.**

Jack previously worked as a track laborer for the railroad. The job involved heavy physical labor, including frequent lifting of more than 50 pounds and

walking on uneven terrain. After more than twelve years of service, at the age of fifty-three, Jack injured his low back in 2005. Approximately two years later, in 2007, the Railroad Retirement Board determined that Jack was disabled from his railroad track laborer job. Dkt. 20, Exhibit C (Defendant's Response To Plaintiff's Motion In Limine).<sup>1</sup>

The Board listed Jack's limitations and concluded that the requirements of his track laborer position exceeded his limitations. Jack's "regular railroad occupation as a track laborer as he describes the job calls for frequent more than medium lifting of at least 50 pounds, and walking on uneven terrain. [Jack] cannot perform these tasks." Dkt. 20, Exhibit C. Thus, the Board concluded that Jack "is not able to do past relevant work." *Id.*

The Board considered whether Jack had transferable skills or could transition to "skilled work." However, the Board concluded that Jack's education level did not "provide for direct entry into skilled work." Dkt. 20, Exhibit C.

The Board relied upon a specific vocational rule to make a finding of "disabled." Dkt. 20, Exhibit C. Even the incomplete record from the disability proceedings submitted by the State shows that the disability determination was

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<sup>1</sup>The State only provided the District Court with four pages from the Railroad Disability file, which was incomplete and did not give the District Court a proper context to fully consider the State's position.

specific to Jack's craft as a track laborer. The disability paperwork in no way suggests that Jack's occupational disability determination was intended to address his limitations other than as related to the specific heavy labor requirements of his maintenance-of-way position.

The disability determination and benefits began in January of 2007, which is about a year and a half after the 2005 back injury. The Board's reason for the delayed disability determination was because "prior to 2007 January 01 Voc. Rule 202.14 *calls for a finding of not disabled.*" Dkt. 20, Exhibit C (emphasis added).<sup>2</sup> Thus, under the pertinent regulations governing railroad disability, Jack was not disabled from his craft at the time of injury in 2005. *Id.* In any event, the disability determination is clearly based on Jack's limitations in light of the specific heavy physical labor requirements of a track laborer considered under applicable federal regulations governing railroad disability. It was simply an occupational disability determination based on applicable federal regulations, nothing more. *Id.*

Moreover, had the disability determination been presented to the jury,

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<sup>2</sup>Thus, the disability issue is not as clear cut as the State represents. Jack was determined to be disabled based on a change to the applicable regulation after the date of his injury. At the time of his injury, he was not considered disabled from his track laborer job.

Jack's treaters would have established that he had largely recovered and had no limitations at the time of the collision in 2013. For example, Dr. Boughton, who began treating Jack several years before the collision, confirmed during his deposition that the injuries Jack sustained in the 2013 car crash were different from Jack's low back issues related to the 2005 railroad injury. Dkt. 52, Eric Boughton, M.D. Dep. Tr., pp. 23:23-25, 24:1-19. Dr. Boughton continued to treat Jack after the car wreck. He testified that Jack's low back was doing better following his back surgeries. He did not place any limitations on Jack as of 2014. Dr. Boughton Dep. Tr., p. 26:1-25.

Similarly, Jack's physical therapist, Josh Henderson, confirmed that in August of 2011, prior to the collision at issue, Jack was doing better. Jack was able to walk around his ranch and climb tractor stairs without issues. He was able to do activities around his farm without issues. Jack was also able to lay in a bed or recline in a chair without pain. Accordingly, Mr. Henderson discharged Jack from physical therapy with no restrictions. Dkt. 29, Exhibit 1 (Henderson Dep. Tr., pp. 12:16-25, 13:1-19).<sup>3</sup>

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<sup>3</sup>The deposition testimony related to Jack's prior back injury and recovery was not admitted at trial but is part of the record on appeal. Dkt. 29 and 52.

**C. Motion In *Limine* Proceedings.**

Jack moved to exclude collateral source evidence, including that he obtained Railroad Disability and Social Security Disability benefits as a result of his 2005 railroad low back injury. Jack pointed out that he was not claiming damages for wage loss or loss of earning capacity and that his back was not injured in the wreck. Jack further moved to exclude evidence of unrelated prior injuries and health conditions based on relevance, prejudice, confusion of the issues, and the lack of expert medical testimony related to any pre-accident injuries and limitations. Dkt. 17, pp. 2-4, Plaintiff's Motions *In Limine*.

The State opposed the motion, seeking to introduce evidence from the administrative disability proceedings related to Jack's 2005 railroad injury. Specifically, the State argued the following evidence was admissible as other cause evidence:

the fact that he claimed he was totally and permanently disabled, the fact he was found to be totally and permanently disabled, the fact he accepted the findings by accepting (to this day) monetary benefits for his total and permanent disability, and the pain and functional limitations he claimed as the basis for his total and permanent disability[.]

Dkt. 20, p. 3, Defendant's Response To Plaintiff's Motion In Limine.

At the motions hearing, the State argued:



[I]t was his position that he was disabled before this accident as evidenced by the fact that he applied for Social Security and Railroad disability benefits.

....

I want to be able to say that [Jack] applied for Social Sec. . . , or that he applied for disability benefits.

Motions Hearing Tr., December 5, 2018, pp. 8:21-24; 9:21-22.

The Court noted that Jack was not seeking any damages for disability or loss of income/earnings. Motions Hearing Tr., December 5, 2018, p. 11:7-9. The Court excluded evidence of the disability proceedings and preexisting back injury, noting that such evidence would be irrelevant and unfairly prejudicial. The Court further held that the evidence was inadmissible under *McCormack v. Andres*, 2008 MT 182, ¶ 26, 343 Mont. 424, 185 P.3d 973, which requires expert medical testimony establishing a causal link between a prior injury in order to apportion the plaintiff's damages. Dkt. 34, Order Granting Plaintiff's Motion In Limine.

Even so, the State was not precluded from presenting other cause evidence related to pain and suffering and loss of established course of life. The State was permitted to rely on other cause evidence related to back pain and limitations impacting Jack's quality of life after the 2013 collision, which was the focus of the State's defense at trial. Trial Tr., pp. 12:24-25, 13:1-5.

**D. Trial.**

During trial, and contrary to its position on appeal, the State repeatedly referenced Jack's back pain and limitations as well as numerous other unrelated health conditions. Thus, the State's representation in its brief that the jury was deprived of information that Jack had back pain and resulting trouble with movement and difficulty with daily activities in considering loss of established course of life could not be further from the truth. In fact, that was the focus of the State's defense.

In its opening statement, the State informed the jury:

Jack doesn't function as well as he did in his 50's or 40's either. He's got a lot of problems other than his shoulder. And those are the part of the story I want to emphasize to you.

....

The fact of the matter is, Jack suffers from a lot of conditions. . . . He has high blood pressure, atrial fibrillation, this back problem that he is going to have surgery on or he's considering having surgery on.

....

He's um, he started treating for neck problems in uh, June of 2014 where he went to a chiropractor for that. In May of 2020 he started with a new chiropractor um, for backpain, which he described as backpain which was a nine out of ten. He said that his backpain was bad that it was, it was limiting his ability to perform activities of ac. . ., of regular daily living like taking care of the ranch, the hobby ranch. Like being able to sleep, forcing him to sleep in a uh, in a chair instead of in his bed. Um, making it difficult just to lay down or get up or walk long distances, or walk without a stoop. He's got problems with his knees. He's got Gout. He's got a lot of problems, physical problems in his life . . . and none of these conditions are

conditions that anyone is alleging were caused by this accident eight years ago back in 2013.

Trial Tr., pp. 181:18-25, 182:1-25, 183:1-2. The State further attributed Jack's problems to old age. Trial Tr., p. 183:3-12.

The State went on:

Recently he described his back problems as being his primary limiting factor, not the right shoulder. Um, in September of 2020 he started developing a uh, this tremor in his right um, hand. That is been thought to be early Parkinson's. Um, I wouldn't want that. Um, he's requested a referral to an orthopedic surgeon in uh, Butte, called Anthony Russo, um that's for a possible back surgery coming up here.

Um, we've heard talk about the right shoulder being a pilot light pain. That is, it's always flickering in the background. Well, unfortunately in Jack's case he's got a variety of physical problems that are always flickering in the background, and he's got a back problem that's a heck of a lot more of a flicker than any, than any of his other problems that he himself has described as his primary limiting activity.

Trial Tr., pp. 183:13-20, 184:1-3.

The State informed the jury about Jack's medical treatment for "various muscle and joint pains, problems with his knees, his hips, his low back, muscle stiffness, the kind of things that were bothering him every day and had— and continued to bother him to this day." Trial Tr., p. 184:4-10. The State further referenced that Jack has received physical therapy for his back and had problems with his left shoulder. Trial Tr., p. 184:11-14.

In cross-examining Jack's orthopedic surgeon, Dr. Stayner, the State got into health conditions other than Jack's right shoulder. The State raised that Jack was treating for problems with his knee and back. The State read from a medical record from Dr. Sherill, one of Jack's treating physicians. "[U]nder the um, history of present illness, isn't he treating Jack for um, low back pain, uh radiating into his buttocks and all the way down his leg and into his foot?" Trial Tr., p. 289:7-18. In violation of the Court's Order *in limine*, the State asked Dr. Stayner if he was aware that Jack was considering having *another* back surgery with Dr. Russo. Trial Tr., p. 290:1-3. Based on this questioning, Dr. Stayner testified that Jack had a prior back fusion and was having back pain. Trial Tr., p. 289:19-24.

Furthermore, the State cross-examined Jack about problems with his back. Trial Tr., p. 359:18-23.

Q: Well, you've had back problems, significant back problems quite a few years and you're looking at another surgery in the future because of those back problems, right?"

. . . .

Q: And then, um, a couple of years ago um, you started seeing Cara Harrop, um, a doctor in Polson, um because of the problems with your back and hips and, um, arthritis in your hands and things like that, is that right?

Trial Tr., p. 360:1-17. Jack admitted that he was looking into back surgery. Trial Tr., p. 360:4.

The State asked Jack about seeing Dr. Harrop in Polson over the past couple years for back pain, pain in his hips and arthritis. The State pointed out that Jack had visited Dr. Harrop more than twenty times in the past couple years. Trial Tr., p. 360:9-23. The State again raised the issue that Jack is considering back surgery and had discussed that with Dr. Harrop. Trial Tr., p. 361:2-5.

The State read from a medical record where Jack reported in July of 2021 that he continues to have back pain and it is his “primary limiting issue.” Trial Tr., pp. 364:24-25, 365:1-2. Jack admitted that he has back pain that radiates down both his hips and his legs. Trial Tr., p. 365:10-12.

The State asked Jack questions about his physical therapy for his back in 2020. Trial Tr., pp. 365:24-25, 366:1. The State questioned him about treating with a chiropractor for his back starting in May of 2020. Trial Tr., pp. 366:21-24, 367:1-4. The State had Jack read and confirm that he reported to his chiropractor that he was having problems with activities of daily life due to his back, including changing positions, walking, laying and sleeping. Trial Tr., p. 367:1-17.

Q: Does that refresh your recollection about you telling Cara Harrop that your back pain was your primary limiting activity in July of this year?

A: Yes.

Trial Tr., p. 368:1-6.

In closing, the State focused primarily on Jack's back problems and other health conditions. In discussing damages, the State argued that while the trial focused on Jack's shoulder, he has other health conditions which impact his quality of life.

You know, Jack, um, he didn't remember for example that um, he had described just a few months ago, he had described his uh, back problems as being his primary limiting factor. He didn't remember that. I mean because we're in a lawsuit and because we're focused obsessively on the right shoulder and he is focused obsessively on the right shoulder, he's forgotten all the other problems that he, that he's having. When just a few months ago he's going to the doctor and saying, my back is really killing me, and its been killing me for a long time and it's my primary limiting factor.

Trial Tr., p. 507:1-12. The State referenced medical records where Jack indicated that he was having difficulty with daily activities due to his back, "including almost any movement, changing positions, walking, laying, or sleeping." Trial Tr., p. 507:18-22. The State then pointed out that Jack was seeking over \$700,000 for pain and suffering and loss of established course of life, and argued that the jury should consider what his course of life actually is. Trial Tr., p. 507:18-25, 508:1-8. "Jack's got a variety of physical problems that are not unlike what other people that are 69 years old have, but his life goes on." Trial Tr., p. 508:8-10.

### **STANDARD OF REVIEW**

"A district court's ruling on a motion in limine is an evidentiary ruling and

the court has broad discretion in determining whether evidence is relevant and admissible and, as such, we will not overturn a district court's determination absent an abuse of that discretion.” *State v. Snell*, 2004 MT 334, ¶ 17, 324 Mont. 173, ¶ 17, 103 P.3d 503, ¶ 17 (citation omitted); *State v. Montgomery*, 2005 MT 120, ¶¶ 6-7, 327 Mont. 138, 140, 112 P.3d 1014, 1016. A district court abuses its discretion when it has “acted arbitrarily without conscientious judgment or exceeded the bounds of reason.” *Seltzer v. Morton*, 2007 MT 62, ¶ 65, 336 Mont. 225, 154 P.3d 561 (citation omitted).

Even where a district court abuses its discretion, the exclusion of evidence is not reversible error unless a substantial right of the appellant is affected or the excluded evidence would have affected the outcome of the trial. *Seltzer*, ¶ 65.

Unless justice requires otherwise, no error in admitting or excluding evidence -- or any other error by the court or a party -- is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

Mont. R. Civ. P. 61.

### **SUMMARY OF ARGUMENT**

The District Court acted within its discretion in excluding evidence from an administrative disability determination related to a 2005 railroad back injury.

Evidence that Jack suffered a work-related low back injury and was determined to be disabled for purposes of his track laborer job, and the specific physical requirements of that position, is irrelevant and would have been unfairly prejudicial. The unrelated back injury, which predated the car wreck and shoulder injury by eight years and the trial by sixteen years, was too remote to be relevant. In addition, this evidence would have confused the issues for the jury to decide and wasted limited trial time because it would have resulted in a mini-trial related to the railroad back injury and disability determination. The mini-trial would have been about Jack receiving RRB and SSD benefits. The State's goal was to poison the trial with an inadmissible administrative finding and collateral source benefits. Finally, the State lacked the requisite expert medical testimony from which a jury could apportion Jack's damages between his prior back injury and his right shoulder injury. The State's failure to have a proper foundation further supports exclusion of the evidence.

If the District Court somehow abused its discretion by keeping the trial focused on the issues from the car wreck, then the error was harmless because it did not affect the State's substantial rights. The transcript is replete with other cause evidence, including numerous references to Jack's back pain and resulting limitations in his daily life. The State was in no way prevented from presenting



evidence and arguing that Jack's back pain was the primary cause of his pain and suffering and loss of established course of life. In fact, the State repeatedly emphasized that, according to Jack's own words, his back was his primary limiting factor. Finally, contrary to the State's position, Jack's counsel in no way commented on the excluded evidence related to the administrative disability determination or suggested it did not exist. Nothing from Jack's counsel's comments that the State did not present expert medical evidence and did not present evidence that Jack's shoulder injury was not caused by the collision can be construed in any way as referencing the 2005 railroad low back injury or the disability proceedings.

## **ARGUMENT**

### **I. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN EXCLUDING EVIDENCE RELATED TO JACK'S RAILROAD LOW BACK INJURY AND RELATED DISABILITY PROCEEDINGS.**

#### **A. The 2005 Railroad Low Back Injury And 2007 Disability Determination Were Inadmissible Under Mont. R. Evid. 401, 402, 403 and 802.**

The 2005 railroad back injury and the 2007 railroad disability finding and award of benefits are inextricably intertwined, which is why the State fought so hard to admit this evidence. The purpose of the evidence was to poison the trial

with inadmissible collateral source evidence. The State admitted as much during the Motion *In Limine* proceedings, making this an easy call for the trial court. *See* Motions Hearing Tr., December 5, 2018, p. 9:21-22 (“I want to be able to say that he applied for Social Sec. . . ., or that he applied for disability benefits.”)

However, railroad disability benefits are an inadmissible collateral source. *Eichel v. New York Central R. Co.*, 375 U.S. 253, 255-56 (1963)(railroad retirement disability payments are an inadmissible collateral source which “involve a substantial likelihood of prejudicial impact”); *see also Anderson v. BNSF Railway*, 2015 MT 240, ¶ 75, 380 Mont. 319, 354 P.3d 1248 (railroad retirement benefits are a collateral source). The admission of collateral source evidence is so prejudicial that it constitutes reversible error. *Mickelson v. Montana Rail Link*, 2000 MT 111, ¶ 46, 299 Mont. 348, 999 P.2d 985; *Thomsen v. State Dept. of Highways*, 253 Mont. 460, 463-64, 833 P.2d 1076, 1078 (1992)(VA benefits were an inadmissible collateral source requiring reversal and a new trial). *See also* Mont. R. Evid. 403.

Moreover, a 2007 disability determination related to physical limitations which were specific to the job requirements of Jack’s track laborer position and which involved an injury to a different body part would not have been probative of anything in this case. Jack’s back was not injured in the wreck and he was not

claiming damages for lost wages or loss of earning capacity. In addition, Jack's back injury resolved with treatment and he had no limitations, which further renders the prior back injury irrelevant. Mont. R. Evid. 401, 402. Additionally, evidence related to a low back injury which occurred eight years before the collision and sixteen years before trial is too remote to be relevant. *See, e.g., Preston v. McDonnell*, 203 Mont. 64, 67, 659 P.2d 276, 277-78 (1983)(evidence related to condition of bakery from ten years before the sale was too remote to be relevant, conditions may have changed during that ten year period of time).

Significantly, admission of evidence related to Jack's railroad low back injury and disability proceedings would have resulted in a mini-trial on issues related to that injury. However, this was an admitted liability case for a right shoulder injury scheduled for only four to five days of trial. Dkt. 84, Pretrial Order, p. 15. Jack would have been forced to use his limited trial time to defend against speculation from the State that his current problems are due to a back injury and occupational disability determination from sixteen years before trial, a position the State did not even attempt to support with expert medical testimony. This mini-trial on an unrelated injury to a different body part would have confused the jury and wasted limited trial time. Accordingly, the evidence was properly excluded under Rule 403.

The State defended this case by focusing on Jack's back pain and the resulting limitations to his daily life. The jury heard evidence that Jack has trouble walking, sleeping, laying down, almost any movement, changing positions, and working on his hobby ranch. The jury heard evidence that Jack had a prior back surgery and was considering another back surgery. The State emphasized at least five times during the trial that Jack reported that his back was his "primary limiting factor." Trial Tr., pp. 183:13-14; 184:2-3; 365:1-2; 368:2-3; 368:10-11; 507:3-4. Thus, any additional evidence related to Jack's back pain and limitations would have been unnecessarily cumulative of the evidence and arguments presented at trial. Mont. R. Evid. 403. The jury was fully informed that Jack has had back pain for years which negatively impacts his daily life.

Finally, the State's attempt to somehow equate Jack's application for RRD benefits as some kind of an admission that he was "disabled" and has continued to be disabled in all aspects of life is a stretch to say the least.<sup>4</sup> The RRD proceedings addressed Jack's ability to perform the specific heavy physical labor of a track laborer. The occupational disability determination was made nearly sixteen years before trial. The Board's occupational disability determination

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<sup>4</sup>The State did not actually provide the District Court with Jack's application paperwork.

related to physical limitations from over a decade and a half before trial is not somehow dispositive of Jack's physical limitations during the many years following his work related low back injury.<sup>5</sup> The Court properly excluded the evidence.

**B. The State Lacked Expert Testimony From Which A Jury Could Apportion Liability And Thereby Hold The State Liable For Only A Portion Of Jack's Damages.**

The State conceded Jack's right shoulder was injured in the crash. It disputed the severity of the injury and the amount of damages. Since the State sought to be held only partially liable for Jack's injury and damages, it was required to prove by a reasonable degree of medical probability that Jack's injuries and damages were divisible. *See McCormack*, ¶ 26; *Henricksen v. State*, 2004 MT 20, ¶ 70, 319 Mont. 307, 84 P.3d 38; *Truman v. District Court*, 2003 MT 91, ¶¶ 17-34, 315 Mont. 165, 68 P.3d 654. Absent this foundation, the evidence was inadmissible at trial.

Like the present case, *McCormack* was an admitted liability case. The plaintiff suffered injuries to her brain, neck and back in the collision at issue. *McCormack*, ¶ 7. The defendant learned in discovery that the plaintiff had previously suffered a neck injury and applied for social security disability benefits.

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<sup>5</sup>In fact, Jack's treaters released him without limitations before the collision.

The plaintiff had also suffered work-related injuries to her neck and back. *Id.*, ¶¶ 8-11. The district court excluded evidence of the prior injuries and that the plaintiff had applied for social security disability. *Id.*, ¶ 25.

On appeal, this Court affirmed. The defendant failed to produce any evidence connecting the plaintiff's injuries from the collision to the prior injuries and disability claim. Specifically, the Court noted:

[a] defendant must establish a “more probable than not causal link. . . .” before a court will allow it to present alternative causation evidence.” *Henrickson*, ¶ 70. The party seeking to introduce alternative causation evidence must demonstrate a causal connection between the present symptoms complained of and a prior accident. *Henrickson*, ¶ 70. Mere speculation constitutes an insufficient basis for admitting alternative causation evidence. *Henrickson*, ¶ 63.

*McCormack*, ¶ 26.

As in *McCormack*, the State has not offered any evidence connecting Jack's 2005 back injury to his shoulder injury and current symptoms. Thus, the State was properly prohibited from asking the jury to speculate on causation based on an injury to Jack's back, not his shoulder, which occurred eight years before the collision and sixteen years before trial. Alternative causation cannot be based on speculation. *McCormack*, ¶ 26.

The State argues that *Clark v. Bell*, 2009 MT 390, 353 Mont. 331, 220 P.3d 650 supports that it should have been allowed to present evidence of the 2005

railroad injury and the administrative disability proceedings. However, in *Clark* the Montana Supreme Court clarified the different evidentiary standards depending on whether causation is denied entirely or in part. When a defendant challenges causation entirely, denying that it is not “the cause or sole cause of an injury,” trial courts have *discretion* to allow evidence of other accidents, injuries or preexisting conditions to negate causation ““subject to traditional evidentiary considerations such as prejudice and relevance.”” *Clark*, ¶ 23 (citing *Truman*, ¶ 31).<sup>6</sup>

However, *Truman* clarified that if a defendant asserts he or she “is only liable for *a portion of* those damages,” or, in other words, asserts that the plaintiff’s injuries can be apportioned to other causes and wants the jury to “reduce [the defendant’s] obligation by *the portion of* [plaintiff’s] damages for which he has proven he [is not] responsible,” then the defendant “must prove, by a reasonable medical probability, that the injury is divisible.” *Truman*, ¶ 32 (emphasis added).

*Clark*, ¶ 23.

Here, the State argued that it is only liable for a portion of Jack’s damages, thereby trying to reduce its obligation for Jack’s damages based on the 2005 railroad back injury. Thus, under *Clark* and *Truman*, it was required to prove divisibility and apportionment.

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<sup>6</sup>As demonstrated above, the evidence was inadmissible under traditional evidentiary considerations such as relevance and unfair prejudice.

In *Clark*, the defendant was permitted to cross-examine plaintiff's experts regarding preexisting injuries under Mont. R. Evid. 705 in order to explore the bases of the experts' opinions. *Clark*, ¶ 22. However, unlike here, the injuries suffered in the crash in *Clark* were the same or similar to the prior injuries. *Id.*, ¶ 26. On the other hand, in this case the prior injury was a low back injury and the injury in this case is a severe right shoulder injury.

In addition, unlike in *Clark*, here the State was seeking to introduce evidence from an administrative disability determination that Jack was disabled from his track laborer job rather than simply cross-examine an expert regarding a preexisting back injury. As demonstrated above, the State was in fact permitted to cross-examine Dr. Stayner regarding Jack's back pain and prior surgery. In fact, the State did much more than that, raising Jack's back pain and limitations at every possible opportunity throughout the trial. Thus, the other cause evidence related to Jack's back pain and its impact on his life and daily activities was presented to the jury. In fact, the State was permitted to introduce evidence related to eight years of back pain, limitations and other health issues, but was properly prohibited from discussing the railroad back injury which predated the trial by sixteen years.

The State's reliance on *Neal v. Nelson*, 2008 MT 426, 347 Mont. 426, 198 P.3d 819 is also misplaced. *Neal* was an admitted liability case but, unlike here,



the defendant denied causation entirely. *Neal*, ¶ 11. Thus, under *Truman*, the defendant would not be required to prove the injury is divisible or that damages can be apportioned. However, it would still be within the trial court's *discretion* whether or not to allow other cause evidence based on evidentiary considerations such as relevance and prejudicial effect. *Clark*, ¶ 23

Significantly, unlike the State in this case, in *Neal* the defendant retained a medical expert to conduct an IME and address causation of the plaintiff's damages, which included testimony regarding prior injuries and preexisting conditions. *Id.*, ¶¶ 26-28. Here, the State did not have an expert to address the cause of Jack's symptoms, limitations and damages. Instead, the State wanted the jury to apportion damages between a shoulder injury caused in the crash at issue and a prior back injury without any expert medical evidence to support apportionment. This is not permitted under Montana law. *McCormack*, ¶ 26.

The State also relies on *Maurer v. Clausen Dist.*, 275 Mont. 229, 912 P.2d 195 (1996). However, *Maurer* supports Jack's position. In *Maurer*, the plaintiff suffered injuries and became depressed after a collision caused by a drunk driver. *Maurer*, 275 Mont. at 232-33, 912 P.2d at 196. The defendants wanted to introduce evidence of a non-related felony charge against the plaintiff which could have been a stressor and caused or contributed to the plaintiff's depression.

However, the district court excluded the evidence due to the potential for prejudice. *Maurer*, 275 Mont. at 233, 912 P.2d at 197. This Court reversed, noting that the charge could have been a stressor and was not unfairly prejudicial.

The Court held that before the defendants could cross-examine the plaintiff regarding the felony charge, the defendants were required to produce testimony that the incident contributed to the plaintiff's depression. Indeed, "evidence of an event which may have contributed to an injury is not admissible unless the evidence establishes a causal connection between the event and the injury." *Maurer*, 275 Mont. at 238, 912 P.2d at 200. The Court remanded and stated that the evidence should only be admitted if a proper foundation is laid. *Id.*

Here, the State did not present any evidentiary foundation showing a causal connection between the prior back injury and Jack's current symptoms and limitations. Thus, *Maurer* supports excluding evidence of Jack's 2005 railroad back injury.

In summary, the State has not actually cited to any case law which supports the admission of evidence from an administrative disability proceeding, including limitations from a completely different injury, as other cause evidence. The State sought to reduce its obligation through evidence of Jack's prior low back injury, which in effect would have asked the jury to apportion damages between the 2005

low back injury and the 2013 right shoulder injury. To do so, Montana law required that the State prove to a reasonable degree of medical probability that Jack's limitations and damages were caused in part by the prior injury. *See Clark*, ¶ 23. The State lacked the requisite expert medical testimony from which a jury could make such a determination.

**II. THE STATE'S SUBSTANTIAL RIGHTS WERE NOT AFFECTED WHERE OTHER CAUSE EVIDENCE WAS INTRODUCED AT TRIAL.**

An error in excluding evidence will not support setting aside a verdict and ordering a new trial unless it affects the substantial rights of the complaining party. Mont. R. Civ. P. 61. Moreover, reversible error cannot be predicated on the exclusion of evidence if evidence which is substantively the same is ultimately admitted at trial. *See Eslinger v. Ringsby Truck Lines, Inc.*, 195 Mont. 292, 303, 636 P.2d 254, 261 (1981)(statement was excluded but officer's testimony provided in substance the same evidence). Nor can reversible error be predicated on exclusion of evidence where the party is allowed a different route to explore the same subject matter at trial. *See Martin v. BNSF Ry. Co.*, 2015 MT 167, ¶¶ 22-23, 379 Mont 423, 352 P.3d 598.

The State would have this Court believe that the jury was deprived of any other cause evidence related to issues with Jack's back or other health conditions

which impact his quality of life. This is untrue. The focus of the State's defense at trial was on Jack's back pain and limitations, as well as other health conditions. In fact, the State repeatedly emphasize that, by Jack's own words, his back pain was his "primary limiting factor." Trial Tr., pp. 183:13-20, 184:1-3.

Indeed, the jury heard a lot of evidence and argument of other potential causes for Jack's pain and suffering and loss of established course of life. There were many references to Jack's back pain issues. The jury was informed that Jack's back pain causes significant limitations on his daily activities, including working on the hobby ranch. The jury was informed that Jack has to sleep in a chair, has difficulty walking, has difficulty moving, and has difficulty laying down and sleeping. The State presented evidence that Jack may have another surgery to address his back pain and limitations and that he has had a prior back surgery. The jury was read a medical record where Jack reported that his back was his "primary limiting factor." The jury was told that Jack's back pain was a "nine out of ten." Trial Tr., p. 182:15-16.

Based on this evidence, the State argued that Jack's back pain was more extreme than the background flicker of his shoulder pain. The jury was further informed that Jack has hand tremors (which the State incorrectly told the jury was Parkinsons), left shoulder pain, knee pain, neck pain, high blood pressure and

gout. The State also focused on the normal aches and pains experienced by someone Jack's age. Thus, the State was clearly not precluded from presenting other cause evidence. The jury likely considered these other health conditions and limitations when it returned a verdict which was substantially less than Jack requested at trial.

Jack's severe shoulder pain when raising his hand overhead or across his body are completely unrelated to his back. Jack established at trial that he has suffered from severe shoulder pain and limitations for nine years since the collision. He has had two rotator cuff repair surgeries. He has repeatedly tried conservative pain management measures. Dr. Stayner opined on a more probable than not basis that Jack's shoulder pain and weakness are permanent and that he will require a shoulder replacement surgery in the future. Dr. Stayner further opined that Jack's shoulder injury was caused by the collision. The State did not present any expert medical evidence to the contrary. Nine years and counting of severe shoulder pain and limitations of shoulder movement, as well as multiple surgeries, injections, MRIs, and courses of extremely painful post-surgical physical therapy certainly supports the jury's verdict.

The State argues it was deprived of a fair trial because Jack purportedly used the Order *In Limine* as a weapon by arguing the State had no evidence to

support its position. The State's argument is disingenuous at best.

For example, the State quotes Jack's counsel's statement that "You will hear zero evidence that his injuries were caused by anything other than the crash."

Appellant's Opening Brief, p. 18.<sup>7</sup> *See also* Appellant's Opening Brief, p. 9. This is a true statement. The injury at issue at trial was Jack's right shoulder injury.

There was zero evidence it was caused by anything other than the crash.

Moreover, the State ignores the context of that statement. Jack was clearly talking about his shoulder injury. *See* Trial Tr., pp. 168-173. To put the quote into the proper context:

Jack's doctors we call as witnesses in this case will testify that his shoulder injury was caused by trauma from the crash. You will hear zero evidence that his injuries were caused by anything other than the crash. Zero evidence that he ever had any problems with his shoulders before the crash.

Trial Tr., p. 173:17-25. There is no possible way to read this quote as somehow commenting on the failure of the State to bring in evidence of a pre-existing back injury or disability proceedings. This statement on the lack of evidence has nothing to do with Jack's back in any way.

The State also references Jack's closing argument where he states that the

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<sup>7</sup>The State cites to page 172 of the trial transcript, but the quote is actually found at page 173:20-22.

State did not bring forth any evidence. Appellant's Opening Brief, pp. 9, 18.

Again, the State has not provided the full context of the statement. Jack pointed out that the case is not about being old or joint pain. Jack noted that the State had referenced other issues in opening but did not bring forth evidence. "They didn't bring any medical experts in to talk to you about any of these issues. Um, they brought no medical evidence to you." Trial Tr., p. 173:1-10.

The State quotes language from Jack's closing where he talks about the impact his shoulder injury has had on his quality of life. Appellant's Opening Brief, p. 10. Jack's shoulder injury is so serious that it has required years of treatment including two surgeries. Jack will require a shoulder replacement. Dr. Stayner testified about the impact of the shoulder injury on even light duty tasks. He testified about the weakness of Jack's rotator cuff, that the injury would be very painful, and that his injuries and limitations are permanent. The jury was instructed that Jack's remaining life expectancy is another 16 years. Trial Tr., p. 471:9-11. This was Jack's theory of the case which was fully supported by the evidence. There was nothing improper about making these arguments in closing. Moreover, the State completely ignores that Jack admitted that he has had back pain issues and limitations for years and that he may have another back surgery.

The State then countered Jack's argument with its own arguments that

Jack's back pain and limitations are the main cause of his pain and suffering and loss of quality of life. It was not bound by Jack's arguments. The State again emphasized that Jack reported that his back is "his primary limiting factor, not the right shoulder." The State reminded the jury that Jack's back limited his ability to perform regular daily activities like taking care of the hobby ranch, sleeping, laying down, and walking. Trial Tr., pp. 182:5-25, 183:13-14.

Significantly, Jack's comments regarding a lack of evidence was referencing the State's lack of medical evidence or expert testimony related to the other health issues raised by the State, including Jack's back pain, which the State clearly understood. In fact, the State's response in closing was as follows:

Um, you know, we were criticized for the fact that we didn't bring in uh, a doctor to talk about all these other medical conditions that Jack has. But they were right there in the medical records. . . . even Jack admitted to them.

Trial Tr., pp. 506:21-25, 507:1-4.

The State's reliance on *Hall v. Big Sky Lumber & Supply*, 261 Mont. 328, 863 P.2d 389 (1993) is misplaced. In *Hall*, the defendant moved *in limine* to exclude evidence that he had been cited for having inadequate and defective brakes, which the court granted. The defendant's counsel then argued during closing that if there was any evidence that there was a problem with the braking



system, “you can be sure that . . . somebody would have told you about that.”

*Hall*, 261 Mont. at 336, 863 P.2d at 395. This Court recognized that “Defense counsel cannot ask to have evidence excluded and then argue that if the evidence existed it would have been admitted.” *Id.* That is clearly not what happened here.

There is nothing in the trial transcript that could potentially be construed as Jack arguing to the jury that the State failed to bring forth evidence of a prior back injury or related disability proceedings, which was the evidence excluded by the Order *In Limine*. Jack in no way implied or suggested that the excluded evidence did not exist. None of the quotations relied upon by the State can be interpreted in this way. Thus, *Hall* is inapposite.

### **CONCLUSION**

The District Court properly excluded evidence regarding Jack’s unrelated railroad back injury and receipt of collateral source benefits from a disability proceeding which occurred eight years before the collision and sixteen years before trial. The State was not precluded from presenting other cause evidence related to Jack’s back pain and related limitations. The State’s position that it was denied a fair trial is not only unsupported by the record, but disingenuous. Accordingly, this Court should affirm.

Dated this 16<sup>th</sup> day of August, 2022.

/s/Kimberly Towe  
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with Proportionately spaced Times New Roman text, typeface of 14 points, is double spaced (except footnotes and quoted and indented material are single spaced); with left, right, top, and bottom margins of one inch; and the word count calculated by WordPerfect is 8,380 words, excluding the Table of Contents, Table of Authorities, and Certificate of Compliance..

Dated this 16<sup>th</sup> day of August, 2022.

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## **CERTIFICATE OF SERVICE**

I, John M. Fitzpatrick, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-16-2022:

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